

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10653 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

RAMESHBHAI ZINABHAI TAILOR

Versus

JOINT SECRETARY (APPEALS)

Appearance:

MR KK TRIVEDI for Petitioners

Ms. Harsha Devani, ASSTT. GOVERNMENT PLEADER for
the Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 23/04/99

ORAL JUDGEMENT

This petition has been filed for quashing the orders dated 7.7.1998/ 13.8.98 of the respondent no.1 Joint Secretary (Appeals), Revenue Department, State of Gujarat.

2. Arjunbhai Chhaniabhai Dhundhia and

others, sons of original land owner moved an application dated 10.4.97 before the Mamlatdar, Vyara, Dist: Surat under section 70(O) of the Code for obtaining the benefit as permanent tenants of the land and alleged that they have been cultivating the said land since many years with tenancy rights. Their Father Chhaniabhai alias Chhanabhai Bhayala had been cultivating the said land as a tenant since 1942-43 to 1946-47 and presently, the applicants as heirs are cultivating the same. It is also stated that they are in possession of the land since 20 years prior to 1956. The matter was investigated by the Circle Officer and it was learnt on the basis of the evidence produced by the applicants that their ancestors have been cultivating and holding the possession of the land of survey no. 147/1, admeasuring 1-05-22 revenue assessed at Rs. 2.44 ps. Mauje Vyara continuously since 1935 without transfer. On the basis of the facts and circumstances, the Mamlatdar, Vyara by his order dated 30th April, 1997 held that the tenancy rights of the lands of survey no. 247/1 admeasuring Acres 1-05-22 revenue assessed at Rs. 2.44 ps. are continuously being held by the applicants through their ancestors and through hereditary rights since 1935 and they have obtained transfer rights in the land held by them. The Deputy Collector came to know that the land has been transferred illegally without previous sanction of the Collector. Hence, he issued a show cause notice for the breach of section 73-AA of the Bombay Land Revenue Code. The land of survey no. 247/1 admeasuring A 1-05-22 was running in the joint names of Arjunbhai Chhaniabhai and other nine persons as heirs of late Shri Chhaniabhai Bhailubhai. As they belonged to scheduled tribe, the land possessed by them is covered by the restrictions prescribed by section 73-AA of the Bombay Land Revenue Code. The land in question was found in possession of the petitioners. Rameshbhai Zinabhai Tailor and Dahyabhai Manibhai Patel. The inquiry unit came to know that the transfer has been made without permission of the Collector. Hence, notice was issued to the parties. The petitioners stated before the Deputy Collector that this land was sold for Rs. 15499/- by Chhaniabhai and an agreement to sell was executed on 21st February, 1980. As full price of the land was received by the land owners. Hence, the possession of the land was also handed over to the petitioners on the same day. It was also stated that as the land was transferred in the year 1980, at that time, the provisions of section 73-AA of the Act were not in force. Hence, there was no breach of the conditions provided by section 73-AA of the Act in transfer of the said land and the petitioners were entitled to purchase the said land. The heirs of the original holders were not

willing to get possession of the said land and they have not applied to get the possession nor applied for obtaining permission for the sale of the said land.

3. The Deputy Collector, by his order dated 4.8.97 held that the land in dispute was running in the joint names of Arjunbhai Chhaniabhai and others total nine persons who are legal heirs of Chhaniabhai Bhailabhai and that land was sold to the petitioners for Rs. 15,499/- by an agreement to sell dated 21.2.80 when Chhaniabhai was alive. After receiving full consideration, possession of the land was handed over to the petitioners. As the land in dispute has been continued in the joint names of nine persons, the heirs of the original land holders, the said land was transferred in favour of the petitioners through an agreement to sell dated 21.2.80 as section 73-AA of the Bombay Land Revenue Code has come in force with effect from 1.2.1981. Therefore, no breach of section 73-AA (4) was committed and hence the notice was also withdrawn. The parties were further directed to get the sale deed registered at the present market value and on the basis of the direction of the Deputy Collector the sale deed was executed on 14.8.97 by the heirs of the land owners in favour of the petitioners and transfer entry was made as entry no. 4313 on the same day, i.e. 14.8.97. The Collector, Surat finding that the transaction of sale was illegal without previous permission of the Collector, the order of the Deputy Collector dated 4.8.97 was not sustainable in the eye of law. Hence, on 23.2.98 he forwarded the papers to the Chief Secretary, Revenue Department (Appeals), Government of Gujarat for the review of the order of the Deputy Collector under section 211 of the Bombay Land Revenue Code.

5. A notice for review under section 211 of the Bombay Land Revenue Code was issued on 18.4.98 by the office of the Chief Secretary (Appeals), Revenue Department, Government of Gujarat to the petitioners. The Joint Secretary, after hearing the parties, by his order dated 7.7.98 considering the fact that the agreement to sell dated 21st February, 1980 which was placed before the Deputy Collector, has been prepared on a stamp paper of Rs.5/-. Looking to the details of the agreement deed, the purchaser has taken the possession of the land in dispute by paying the sale consideration of Rs.15,499/-. The restriction of section 73-AA of the Code were not in force on the date of the agreement to sell. If the purchaser of the land would have taken possession of the land in dispute by making full payment of sale consideration, the sale deed in favour of that

transaction could have been registered soon after the execution of agreement to sell. The amendment prescribing the restriction of section 73-AA was inserted in the Land Revenue Code with effect from 1.2.1981, and came to the conclusion that it appears that the evidence of agreement to sell has been credited subsequently for the purpose of getting exemption from the said restriction. Moreover, the Deputy Collector directed the parties to get the sale deed registered as no breach of restriction of section 73-AA has taken place. The Deputy Collector had no jurisdiction to pass such a direction to the parties concerned for getting the sale deed executed and registered.

5. Heard the learned counsel for the parties at length. The learned counsel for the petitioners has challenged the order of the Joint Secretary (Appeals), Revenue Department on the ground that the show cause notice issued to the petitioner does not show the ground that the Deputy Collector has no jurisdiction for granting permission under section 73-AA (4) of the Code and agreement to sell is anti-dated document. He also relied on the judgment reported in 1970, GLR,919. He also submitted that the revenue entries were not made in favour of the petitioners though the petitioners are in possession of the land since 1980. As it is a new tenure land and was sold after 1977, a sale deed could not have been executed without payment of premium as required under statutory rules. It was converted into old tenure land after the order dated 30th April, 1997 of the Mamlatdar when the Government resolution dated 18.3.1996 came into force. Regarding question whether the Deputy Collector has jurisdiction to grant permission under section 73-AA (4) of the Bombay Land Revenue Code, it was submitted that the Deputy Collector has power by the government resolution of dated 18.3.96 to grant permission under section 73-AA (4) of the Code and as such, the order of the Deputy Collector was justified and the order of the Government is illegal. He also argued that whether the agreement to sell is a fraud or genuine document could have been decided by the Civil Court. The Government has no jurisdiction under section 211 of the Code for holding that it is a subsequent document and prepared in order to avoid statutory conditions under section 73-AA(4) of the Code. If the Deputy Collector has power to grant permission, then the Government cannot exercise revisional power under section 211 of the Code as an appellate authority and it has no power to record a finding that the agreement to sell is a subsequent document prepared in order to avoid statutory condition. The petitioners have not been given an opportunity to

plead their case before appropriate authority in this connection. As such, the order of the Government is against principles of natural justice. It is also argued that entry no. 4113 was made on 14.8.97 on the basis of the sale deed and Sanad has also been executed in favour of the petitioner. Without expunging that entry and cancelling the sanad, the order of the Government is not sustainable in the eye of law. At the most, the government could have directed the appropriate authority to re-consider the matter on the basis of the representation. The Tribunal has quashed the order of the Deputy Collector. The sale deed has not been cancelled which has been registered in the manner prescribed by law. As such, the petitioners are holding the rights and title and mutation entry has also been given effect to in the name of the petitioners. This has also not been cancelled. Without getting the sale deed cancelled and mutation entry expunged, the Tribunal has no jurisdiction to arrive at any finding. Ex-post facto sanction could have been granted even if the Government officer has committed a mistake in not granting the permission to the parties concerned. As the petitioners have invested a huge amount of about Rs.3 lakh, for making the land cultivable, the provisions of section 73-AA are not applicable in the present case in view of the judgment of this Court.

6. Learned Assistant Government Pleader Ms.

Harsha Devani on the other hand vehemently argued that the provisions of section 73-AA(4) of the Code have been inserted by the amendment for protecting the interest of tribals. Section 73-AA of the Code prohibits the transfer of any land to non-tribal person. The Deputy Collector had no jurisdiction to direct the parties to get the sale deed registered at the market price. Under the provisions of section 54 of the Transfer of Property Act, the agreement to sell is not a transfer at all, unless the sale deed is executed and registered no title can pass to any person in whose favour the transfer has been made. As the sale deed has been executed on the direction of the Deputy Collector, without previous sanction of the Collector, it is illegal and without authority. Under the provisions of section 43(2) of the Bombay Tenancy and Agricultural Lands Act, 1948, any transfer or partition or any agreement of transfer of any land or any interest therein in contravention of sub-section(1) has been declared to be invalid. According to the petitioners, it has been agreed by an instrument in writing to transfer the land without previous sanction of the Collector is illegal. It is further submitted that the agreement to sell is not

binding on the Government and it may be a dispute between the parties for the titles. It is also pointed out that the petitioners cannot take both advantages by saying that the land was a new tenure land and they were required to deposit the amount in accordance with the provisions of law. Hence, the sale deed could not be executed, as they were required to deposit the required amount. While in the inquiry by the Mamlatdar, it was argued that the land be treated as an old tenure for exemption for the deposit of the required amount. It was also argued that when there is a breach of condition, no equity can be claimed when such a huge amount has been expended by the petitioners. In support of this contention, the learned Assistant Government Pleader relied on the judgment in the case of Murlidhar Dayande Keskar vs. Vishwanath Pandu Barde and another reported in 1995 Supplementary (2) SCC, 549. He further submitted that if there is a fraud or collusion, the proceedings can be initiated even after 27 years and in support of this contention, she relied on the judgment in the case of State of Orissa and others vs. Brundaban Sharma and another reported in 1995 (3) SCC, 249 holding that the proceedings can be taken as soon as the fraud or collusion comes to the knowledge of the authority even after 27 years.

7. Both the parties have relied on certain case laws. I have carefully considered the contentions raised by the learned advocates for the parties. So far as the issue raised by the learned counsel for the petitioners that the show cause notice does not contain the ground that the Deputy Collector has no jurisdiction for granting permission under section 73(AA)(4) of the Bombay Land Revenue Code and the agreement to sell is prepared subsequently after the amending Act came into force are concerned, it is a legal ground whether Deputy Collector has jurisdiction to direct the parties concerned to execute a registered sale deed or not. This power has not been conferred in any statute for the exercise by the Deputy Collector and legal ground can be raised at any stage. Even if it is not mentioned in the show cause notice, on the face of the prima facie material, the authority can hold that the alleged agreement to sell was prepared subsequently after the amending Act came into force and the Deputy Collector has no jurisdiction to direct the parties to execute the sale deed. As such, the argument of the learned advocate for the petitioners is not tenable. The learned counsel for the petitioners argued that the petitioner are in possession from the date of the agreement to sell, i.e. 21.2.80 and they could not deposit the required premium as the land was a new tenure land. While during the

inquiry before the Mamlatdar at Vyara, on the application of the original land owners for holding them as old tenure holders under section 70(O) of the Bombay Tenancy and Agricultural Lands Act, 1948 wherein it has been argued that the original owners remained and still are in possession throughout 15 or 20 years prior to Independence till the date of application dated 10.4.97 and the land was not transferred to any person. Hence, they requested for the benefit under section 70(O) of the Bombay Tenancy and Agricultural Lands Act, 1940 that they are old tenure lands and they are not required to pay premium required under the law for transfer. The petitioners cannot take both advantages that they were in possession since 1980 and on the basis of the order dated 30th April, 1997 of the Mamlatdar, Vyara that the land owners remained in possession throughout till the date of the application i.e. 10.4.97. From the decision of the Mamlatdar, it appears that the land was not transferred to any person and the claim of the petitioners is false and the agreement to sell has been prepared subsequently in order to avoid restrictions prescribed by section 73-AA of the code. So far as the contention of the learned counsel for the petitioners that whether the agreement to sell is a forged or genuine could be decided by the Civil Court and the Government has exceeded in exercise of its review power in holding that it is a subsequent transaction in order to avoid statutory restrictions concerned, it is true that the question whether agreement to sell in dispute is a forged or genuine could be decided in the regular proceedings by a Civil Court in a suit, but the Government has not exceeded in exercise of its powers in holding that the document appears to have been prepared subsequently in order to avoid statutory conditions of section 73AA(4) of the Code. As the authorities have to see on the basis of material on record whether any prima facie case is made out or not. In the present case, the Government has not exceeded in exercising its review/revisional powers in holding that the agreement to sell has been prepared subsequently in order to avoid statutory conditions, inasmuch as agreement to sell was prepared on 21.2.80. If the petitioners were in possession of the land in dispute, and they had paid full amount of sale consideration, then the registered sale deed could have been made at any time. But it was not executed from 1980 to 1997 and that sale deed was executed only on the direction of the Deputy Collector. There is no entry regarding possession of the petitioners over the land in dispute from the date of agreement to sell till 18.8.97 when the sale deed was executed on the direction of the Deputy Collector and the land owners moved an application

dated 10.4.97 claiming to be old tenure holders and in possession till the date of the application which shows that the petitioners had never entered into possession over the land in dispute during the aforesaid period. Secondly, during the inquiry before the Mamlatdar, it was asserted by the heirs of the original tenure holders of the land in dispute that they have remained in possession of the land prior to independence till the date of the application and they have not transferred the land to any person. As such, the petitioners have never remained in possession at any stage. If they were not in possession as alleged by them on the basis of the agreement to sell which has been prepared and executed subsequently only in order to avoid restrictions prescribed by the amending Act under section 73AA of the Bombay Land Revenue Code. As such, they are committing a fraud in the judicial proceedings. If they were not in possession of the land in dispute, their contention that they have invested a huge amount in getting the land developed is false and not sustainable in the eye of law. The contention of the learned Assistant Government Pleader that the agreement to sell is not a transfer under the provisions of section 54 of the Transfer of Property Act and that the transfer by the sale deed or agreement to sell is illegal without previous sanction of the Collector under section 43(2) of the Bombay Tenancy and Agricultural Lands Act, 1948 is acceptable.

7. The learned Assistant Government Pleader also pointed out that even if the order of the Tribunal appears to be erroneous then also, this Court should exercise powers under Articles 226 and 227 of the Constitution of India.

8. In view of the above discussion, and in the facts and circumstances stated above, in my opinion, the findings of the Joint Secretary are just, proper, legal and justifiable and I do not find any good ground to interfere with the same in exercise of extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. Thus, this petition is liable to be dismissed. Accordingly this petition is dismissed. Rule is discharged with no order as to costs. Interim relief, if any, stands vacated.

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